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The Model State Administrative Procedure Act: Planned Restraint on the Consolidation of Power by Executive Branches of State Governments

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THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT:
PLANNED RESTRAINT ON THE
CONSOLIDATION OF POWER BY
EXECUTIVE BRANCHES OF
STATE GOVERNMENTS

ANNE K. PECORA*

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“THE accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹

I. INTRODUCTION

In order to prevent the accumulation of power in one body, the drafters of the United States Constitution created a federal

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1. THE FEDERALIST No. 47, at 301 (J. Madison) (New American Library ed. 1961).

system of government whose powers—legislative, judicial and executive—were vested in three separate branches, each being a check on the power of the other two.² Despite this Constitutional framework, executive prerogative increased during the “New Deal” era which saw much growth in statutorily created executive agencies whose actions were subject to limited judicial review. In 1933, the Executive Committee of the American Bar Association recognized this trend toward increased federal administrative autocracy and appointed a Special Committee on Administrative Law (Special Committee) to study the causes of this trend and to

2. See U.S. CONST. art. I, II & III. In articles I, II & III the framers set forth the powers and duties of the legislative, executive and judicial branches, respectively. *Id.* Although there is no implicit reference to it in the Constitution, the doctrine of separation of powers has emerged from this constitutional framework. See G. GUNTHER, CONSTITUTIONAL LAW 336 (11th ed. 1985). The hallmark of the doctrine is that the three separate branches of the federal government function in such a manner as to provide checks and balances on each other's power, to protect the rights and liberties guaranteed to the public in the Constitution and to preserve the republican form of government established by the framers. See *id.*

The related concepts of “separation of powers” and “checks and balances” have been described as follows:

“[S]eparation of powers” supposes that what government does can be characterized in terms of the kind of act performed—legislating, enforcing, and determining the particular application of law—and that for the safety of the citizenry from tyrannous government these three functions must be kept in distinct places. Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function. These three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.

“Checks and balances” . . . [l]ike separation of powers . . . seeks to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle; the intent of that struggle is to deny to any one (or two) of them the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of government. Unlike separation of powers, however, the checks and balances idea does not suppose a radical division of government into three parts, with particular functions neatly parceled out among them. Rather, the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue. From this perspective, as from the perspective of separation of functions, it is not important how powers below the apex are treated, the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence.

Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577-78 (1984).

suggest remedial legislation.³ As a result of its studies, this Special Committee observed that certain tendencies of federal administrators caused executive absolutism through administrative fiat, and that many state administrators possessed identical traits causing the same result in state government.⁴

In 1944, the Commission on Uniform State Laws and the American Bar Association proposed the Model State Administrative Procedure Act (1944 Act or 1944 MSAPA)⁵ for adoption by states as a means to curb these tendencies. In 1961, the Commission revised the 1944 Act.⁶ Those states which have adopted an administrative procedure act have adopted the 1961 Revised Model State Administrative Procedure Act (1961 Act or 1961 MSAPA) or its equivalent.⁷

This article first describes the powers that state administrative agencies have in the absence of state adopted administrative procedure acts. The article goes on to summarize the findings of the Special Committee relating to state administrative law and analyzes state court decisions which have interpreted and applied state administrative procedure acts. This analysis addresses the question of whether state administrative procedure acts have sufficiently protected individual rights from encroachment by executive agencies or whether further state legislation is needed.

II. EXECUTIVE, LEGISLATIVE AND JUDICIAL POWERS OF STATE ADMINISTRATIVE AGENCIES

State administrative agencies are created and empowered to act by state legislatures. They are part of the executive branch of government, with their directors appointed by and serving at the pleasure of the chief executives of the states.⁸ Notwithstanding

3. See 58 A.B.A., REPORT OF THE FIFTY-SIXTH ANN. MEETING 318 (1933) [hereinafter 1933 REPORT].

4. See 63 A.B.A., REPORT OF THE SIXTY-FIRST ANN. MEETING 361 (1938) [hereinafter 1938 REPORT].

5. See NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, 1944 HANDBOOK OF NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-FOURTH ANN. CONF. 329 [hereinafter 1944 HANDBOOK].

6. See NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, 1961 HANDBOOK OF THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANN. CONF. MEETING IN ITS SEVENTIETH YEAR 206 [hereinafter 1961 HANDBOOK].

7. See UNIF. LAW. COMM'R MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 14 U.L.A. 357 (1980 & Supp. 1986) (prefatory note) [hereinafter 14 U.L.A.].

8. See, e.g., *St. Regis Paper Co. v. New Hampshire Resources Board*, 92 N.H. 164, 167, 26 A.2d 832, 836 (1942) (holding state Water Resources Board

their inherent executive powers, such as the power to inspect, direct, and supervise, state agencies may also be statutorily authorized to function in a legislative⁹ or judicial capacity.¹⁰

For example, when a state agency exercises its discretion and judgment by applying laws and rules to specific facts in adjudicatory proceedings which affect present individual property or liberty rights, it has acted in a judicial capacity.¹¹ Thus, in a case where a state agency deprived a business of its statutorily created preferred status as a minority business enterprise, that agency necessarily acted like a court in applying the statutory and regulatory eligibility criteria to the business's specific fact situation.¹² On the other hand, when a state agency is framing rules or regulations that have general application and future effect, it acts in a legislative capacity.¹³ Accordingly, where a state agency formulated a rule setting maximum limits of public benefits for all recipients, that rule had general application and future effect and thus

to be branch of executive department of state government); *In re Kallen*, 92 N.J. 14, 20, 455 A.2d 460, 463 (1983) (noting administrative agencies' function as arm of executive branch, with decisional power invested in agency head).

9. See, e.g., *Consolidation Coal Co. v. Kandle*, 105 N.J. Super. 104, 113, 251 A.2d 295, 300 (N.J. Super. Ct. App. Div.) (observing that administrative agencies in some cases act as legislative bodies), *aff'd*, 54 N.J. 11, 252 A.2d 403 (1969).

10. See, e.g., *Roberts v. City of Cranston Zoning Bd.*, 448 A.2d 779, 781 (R.I. 1982) (zoning boards perform quasi-judicial duties in exercising fact-finding powers).

11. See *Allegheny Ludlum Steel Corp. v. Pennsylvania Pub. Util. Comm'n*, 501 Pa. 71, 77, 459 A.2d 1218, 1221 (1983). In *Allegheny*, the Pennsylvania Supreme Court found administrative action to be "adjudicatory in character when [such actions] culminate in a final determination affecting personal or property rights." *Id.* The court held, however, that the adjudicative action of the Public Utility Commission did not violate appellant's constitutional right to procedural due process. *Id.* at 76, 459 A.2d at 1222; see also *Carlson v. Oliver*, 372 A.2d 226, 229 (Me. 1977) (holding that agency acts in quasi-judicial capacity where it affects constitutionally protected interests).

12. See *Warwick Corp. v. Department of Transp.*, 61 Md. App. 239, 486 A.2d 224 (1985).

13. See *Pied Piper Ice Cream, Inc. v. Essex County Park Comm'n*, 126 N.J. Super. 301, 314 A.2d 93 (N.J. Super. Ct. Law Div. 1974), *rev'd*, 132 N.J. Super. 480, 334 A.2d 337 (N.J. Super. Ct. App. Div. 1975). In *Pied Piper*, the plaintiff ice cream company sought to set aside a contract awarded to a competitor by the Essex County Park Commission, a New Jersey state agency. 126 N.J. Super. at 303, 314 A.2d at 94. The Commission had awarded the contract without taking competitive bids. *Id.* The New Jersey Superior Court, Law Division, deferred to the legislative power of the Commission and upheld the contract, recognizing that the "[l]egislature may properly confer upon an administrative authority the power to enact rules and regulations to promote the spirit of its mandate and carry it into effect." *Id.* at 307, 314 A.2d at 96. On appeal, the New Jersey Superior Court, Appellate Division, reversed and remanded, finding the Commission's failure to take bids to be "contrary to law." 132 N.J. Super. at 486, 334 A.2d at 341.

the agency was acting in its legislative capacity.¹⁴

Because a state has the power to define property rights such as public benefits, it also has a duty to accord procedural protections commensurate and consistent with the due process provisions of the fourteenth amendment as well as with state statutory and constitutional due process mandates.¹⁵ This article takes the position that universal adoption of state administrative procedure acts is necessary to preserve such constitutional safeguards and to avoid abuse of the broad power seated in state administrative agencies.

III. LIMITATIONS ON JUDICIAL REVIEW OF AGENCY ACTIONS BEFORE STATES ADOPTED ADMINISTRATIVE PROCEDURE ACTS

Prior to states adopting some form of state administrative procedure act, courts had consistently held that the judicial action of a state agency, such as a decision to revoke a professional license, was a discretionary act, and was, therefore, reviewable by a court.¹⁶ Constitutional due process requirements and the common law gave state courts jurisdiction to review agency actions by way of mandamus, injunction or certiorari.¹⁷

Courts have stated different reasons to support their jurisdic-

14. See *Eagle Hill Corp. v. Commission on Hosps. and Health Care*, 2 Conn. App. 68, 477 A.2d 660 (1984). In *Eagle*, the court recognized the regulatory power of the Connecticut Commission on Hospitals, and held that the Commission had acted within its scope of authority in denying a capital expenditure increase sought by plaintiff. *Id.* at 75-77, 477 A.2d at 665-66.

15. See *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the United States Supreme Court considered whether the transfer of a Nebraska prisoner by the state Director of Correctional Services violated a liberty interest of the prisoner that was protected under the due process clause, where the prisoner had not received adequate notice or an opportunity for a hearing prior to his transfer to a state mental hospital. *Id.* at 482-83. The Court analogized the state mandated procedural safeguards to the delineation of property rights, and thus found that the same due process protections applied to decisions which would abrogate such rights. *Id.* at 488. The Court, therefore, held that the Nebraska prisoner was "entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital." *Id.* at 493.

16. See, e.g., *State v. Conragan*, 192 A. 752, 756 (R.I. 1937) (holding that quasi-judicial discretionary power vested in state public health department did not violate state constitution since department's decisions were reviewable by superior court).

17. See, e.g., *Burke v. Fidelity Trust Co.*, 202 Md. 178, 188, 96 A.2d 254, 260 (1953) (opportunity for judicial review to ascertain whether elements of due process have been met is sufficient); *Hecht v. Crook*, 184 Md. 271, 280, 40 A.2d 673, 677 (1945) (courts have inherent power by writ of mandamus or by injunction to correct abuses of discretion).

tion to review actions of the executive branch of government. In *Hecht v. Crook*,¹⁸ for example, the Maryland Court of Appeals expressed its authority to review agency action in terms of the nature of the function of the agency.¹⁹ In *Hecht*, where an agency functioned like a court by weighing evidence, finding facts and applying law to the facts found, an individual's right to due process of law encompassed the right to limited judicial process.²⁰ The Maryland approach may be compared with that of the California Supreme Court in *Laisne v. State Board of Optometry*²¹ where the court expressed its authority to review agency actions in terms of the individual's interest at stake.²² The common theoretical thread underlying the court's right to review executive action has been the individual's right to due process of law when a state agency has impinged upon individual personal rights.

The scope of review of an agency's findings of fact has been another concern of some courts. Courts have limited such review to a determination of whether there was any foundation in fact for an agency's action,²³ or whether the action was in the exercise of discretion.²⁴ These standards are the functional equivalents of the scope of review contemplated under the 1961 MSAPA.²⁵ Pursuant to the 1961 Act, a determination of whether there is any substantial evidence supporting the agency action must always be made.²⁶ If there is no substantial evidence found to support the

18. 184 Md. 271, 40 A.2d 673 (1945).

19. *Id.* at 277, 40 A.2d at 676-77.

20. *Id.* The court held that where the legislature does not provide for judicial review of adjudicatory actions of a state agency, courts have the power, through mandamus or injunction, to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts. *Id.* at 280, 40 A.2d at 677.

21. 19 Cal. 2d 831, 123 P.2d 457 (1942). In *Laisne*, the court held that since a license is a vested property right, it cannot be finally destroyed by an administrative agency if the action of that agency is questioned in a court proceeding for a writ of mandamus. *Id.* at 840, 123 P.2d at 463.

22. *Id.* at 838, 123 P.2d at 461-62.

23. *See, e.g.,* Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945) (where no foundation of fact supported agency's denial of widow's claim for husband's death benefits, court could compel payment of benefits).

24. *See, e.g.,* Schwab v. McElligott, 282 N.Y. 182, 186, 26 N.E.2d 10, 12 (1940) (where agency's action was based on medical report which was not founded in fact, it necessarily followed that agency action was arbitrary, capricious and abuse of discretion).

25. *See* 1961 HANDBOOK, *supra* note 6, at 221.

26. *See, e.g.,* Stoffan v. Pennsylvania Dep't of Public Welfare, 31 Pa. Commw. 203, 205, 375 A.2d 894, 895 (1977) (holding that scope of review of administrative agency decisions as to findings of fact is limited by administrative agency law to determination of whether findings of fact were supported by substantial evidence).

agency action, the action is “clearly erroneous.”²⁷

Courts also have reviewed agency action to determine whether the agency had based its decision on an error of law.²⁸ However, rules and regulations promulgated by agencies in their legislative capacity were subjected to common law judicial scrutiny only when the courts were considering agency judicial action based on agency rules or regulations.²⁹

IV. FINDINGS OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW OF THE AMERICAN BAR ASSOCIATION

In May of 1933, the Executive Committee of the American Bar Association appointed a Special Committee on Administrative Law.³⁰ The Special Committee’s yearly reports are mirrors of their time, chronicling the social, economic, legal and political developments of the day. In its first report and address to the Bar Association, the Committee noted the large number of federal agencies which had recently been created by “New Deal” legislation.³¹ These federal agencies concentrated broad legislative and judicial powers in an executive body,³² as distinguished from independent boards or commissions. The determinations made by these “New Deal” federal agencies were virtually immune from judicial review.³³ Refusing to voice an opinion on the constitutionality of the substance of the new agencies, the Special Committee stated: “We regard ourselves at least for the present as concerned with *adjective* law, so to speak—with the adequacy and the efficiency of the machinery employed and not with the purposes for which it is employed.”³⁴

27. 1961 HANDBOOK, *supra* note 6, at 221.

28. See, e.g., *Hecht*, 184 Md. at 280, 40 A.2d at 677 (stating that “[q]uestions involving the interpretation of pension statutes or ordinances have been held reviewable in other states, either by certiorari or mandamus, where no direct appeal is provided”).

29. See *Noble v. English*, 183 Iowa 893, 167 N.W. 629 (1918). In *Noble*, the plaintiff challenged the State Insurance Commission’s authority to promulgate a rule limiting the issuance of licenses to out-of-state businesses operating in Iowa to those businesses having an Iowa resident agent. *Id.* The Iowa Supreme Court held that the commissioner could not be compelled via mandamus to issue a license where good cause for denial of a license exists. *Id.* at 898, 167 N.W. at 631.

30. See 1933 REPORT, *supra* note 3, at 318.

31. *Id.* at 197.

32. *Id.* at 418-25.

33. *Id.* at 424.

34. *Id.* at 199 (emphasis in original).

The Committee observed that the concentration of the three powers in the hands of one body would lead to tyranny, stating:

When the safeguard of isolation of the judicial function is dispensed with, the practice of law degenerates all too often into a glorified form of lobbying, all semblance of ethics disappear, cases are decided off the record according to the wishes of politicians, and the profession, at times deservedly, falls into disrepute.³⁵

In its 1934 report, the Special Committee made remedial suggestions. First, the Committee recommended that rules or regulations resulting from the legislative activity of administrative agencies be subject to registration and publication requirements.³⁶ Second, the Committee proposed that decisions of administrative tribunals be made readily available to the public at some central office.³⁷

In 1936, the Special Committee reported that the commingling of legislative, judicial and executive branches had become the identifying badge of an administrative agency.³⁸ This commingling and the use of euphemisms such as "quasi-legislative" and "quasi-judicial" implied that there was a fourth branch of government not subject to the constitutional safeguards imposed on the other three branches.³⁹ The 1936 Special Committee observed that the separation of powers doctrine was not "merely a matter of convenience or of governmental mechanism. Its object is basic and vital, . . . namely, to preclude a commingling of these essentially different powers of government in the same hands."⁴⁰

Though originally established to study federal administrative law and propose remedial legislation, the Special Committee soon realized that the defects existing in federal administrative agencies also existed in state administrative agencies.⁴¹ In 1938, the Special Committee identified several tendencies of administrators as the "roots of the evil" of executive absolutism. It is these traits which were intended to be checked by states which

35. *Id.* at 204.

36. See 59 A.B.A., REPORT OF THE FIFTY-SEVENTH ANN. MEETING 540 (1934) [hereinafter 1934 REPORT].

37. *Id.*

38. See 61 A.B.A., REPORT OF THE FIFTY-NINTH ANN. MEETING 727 (1936) [hereinafter 1936 REPORT].

39. *Id.*

40. *Id.* (quoting *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933)).

41. See 1938 REPORT, *supra* note 4, at 361-62.

adopted the Model State Administrative Procedure Act.⁴² These characteristics include the following:

- (1) A tendency to attempt evasion of judicial review;
- (2) A tendency to adjudicate individual rights without a hearing or at an ex parte proceeding;
- (3) A tendency to decide on the basis of matters not properly before the tribunals;
- (4) A tendency to confuse the roles of investigator, prosecutor and decision-maker; and
- (5) A tendency to make rules arbitrarily, for administrative convenience and at the expense of important individual and public interests.

The 1941 Special Committee Report traced the weakening of our constitutional form of government, with its three separate and independent branches, back to the 1880's when Americans who had been studying in continental universities returned to the United States to teach in American colleges.⁴³ The Committee noted that the returning Americans were educated in the European legal systems rather than in the American system. Many forms of European governments were derived from or influenced by the autocracies of Asia Minor and Egypt. Under such autocratic systems, individuals had no enforceable rights against their government since the executive prerogative was absolute.⁴⁴ The Committee blamed these new teachers, many of whom taught courses in political science and administrative law, in part for the proliferating acceptance of concentration of power in the executive.⁴⁵ Looking at Europe in 1941, the Committee observed absolute power in the hands of European dictators who commanded firing squads, Gestapos and concentration camps, and it stated that the United States was "once again the only oasis in a desert of totalitarianism The task is ours to preserve the Republic."⁴⁶

The first Model State Administrative Procedure Act was proposed for adoption by the Commission on Uniform State Laws and approved by the American Bar Association in 1944.⁴⁷ It was

42. *See id.* at 346-51.

43. *See* 66 A.B.A., REPORT OF THE SIXTY-FOURTH ANN. MEETING 441-42 (1941) [hereinafter 1941 REPORT].

44. *See id.* at 441.

45. *Id.* at 443.

46. *Id.* at 441.

47. *See* 1944 HANDBOOK, *supra* note 5, at 329.

intended to be a bridle on the unrestrained behavior of state administrators, which had resulted in administrative fiat and executive absolutism.⁴⁸ The 1944 MSAPA proposed boundaries within which state agencies could exercise their judicial or legislative powers. Individual, personal and property rights were protected by minimal, but previously nonexistent, procedural safeguards.⁴⁹

In 1961, with the endorsement of the American Bar Association, the Commission revised the MSAPA.⁵⁰ The 1961 Act reflects changes in federal and state laws and incorporates "certain basic principles of common sense, justice, and fairness that can and should prevail universally."⁵¹ The 1961 Act varies from the 1944 Act in several important respects. The substantive requirements of notice and hearing are specific in the 1961 Act, rather than general, as in the 1944 Act. The scope of public information is broadened and each state agency is required to make rules describing its organization and the general course of its operations.⁵² Any rule not made available for public inspection or not promulgated in substantial compliance with the Act is deemed to be invalid. The definition of contested cases in the 1961 MSAPA specifically includes licensing and the right of cross-examination was made more explicit.⁵³

A review of some state court decisions interpreting state administrative procedure acts applied to actual controversies will illustrate that the feared proclivities persist. However, a question remains as to whether courts' interpretations of the acts have checked the executive administrator's propensity to grasp power at the expense of individual rights. Further, if it is found that individual rights are hampered, a question remains as to whether additional legislation is needed to protect those rights.

48. See 1938 REPORT, *supra* note 4, at 342-51.

49. For a discussion of limitation on judicial review of agency actions prior to the states' adoption of administrative procedure acts, see *supra* notes 16-29 and accompanying text.

50. 1961 HANDBOOK, *supra* note 6, at 84.

51. *Id.* at 204.

52. *Id.* at 210-11.

53. See *id.* at 199-223.

V. JUDICIAL INTERPRETATION OF STATE ADMINISTRATIVE PROCEDURE ACTS

A. *The Tendency to Evade Judicial Review*

As adopted by state legislatures, the 1961 MSAPA applies to any state agency authorized by law to make rules or regulations, or to adjudicate contested cases.⁵⁴ Despite the functional definition of "agency,"⁵⁵ state administrators have attempted to evade the jurisdiction of the courts conferred by the acts solely on the basis of the name of an entity. It has been held, however, that the official title of an entity is not determinative of whether that entity is a "state agency" as defined by the Act.⁵⁶

For example, in *Newport Homes, Inc. v. Kassab*,⁵⁷ the Pennsylvania Department of Transportation attempted to evade judicial review of the agency's denial of a hauling permit, partially on the ground that a hauling permit was not a right and thus a denial of such a permit was not an adjudication subject to judicial review under Pennsylvania's administrative agency law.⁵⁸ The court held that Pennsylvania's statute, which was substantially similar to the MSAPA, assured any person aggrieved by an adjudication of a state agency the right to judicial review.⁵⁹ Pursuant to the Pennsylvania statute, an adjudication is any order by a state agency affecting the personal or property rights of a party to the proceeding by which the adjudication is made.⁶⁰ Thus, the *Newport Homes*

54. *See id.* at 206-07.

55. *See id.* The 1961 HANDBOOK defines "agency" as "each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases." *Id.*

56. *See* *Hopkins v. Pac.*, 180 Conn. 474, 429 A.2d 952 (1980); *Kaufman v. Taxicab Bureau*, 236 Md. 476, 204 A.2d 521 (1964), *cert. denied*, 382 U.S. 849 (1965).

57. 17 Pa. Commw. 317, 332 A.2d 568 (1975).

58. *Id.* at 327-29, 332 A.2d at 573-74.

59. *Id.* at 322, 332 A.2d at 571-72. *Compare* Administrative Agency Law, Pub. L. 1388, No. 442, § 1 (1945) (previously codified at PA. STAT. ANN. tit. 71 § 1710.2 (Purdon 1962)), *repealed by* Administrative Agency Law, Pub. L. 202, No. 53, § 5 (1978) (codified at 2 PA. CONST. STAT. ANN. § 101 (Purdon Supp. 1986)) *with the 1981 MSAPA presented in* NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1981 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETIETH YEAR 219 [hereinafter 1981 HANDBOOK].

60. *See* Administrative Agency Law, Pub. L. 1388, No. 442, § 1 (1945) (previously codified at PA. STAT. ANN. tit. 71, § 1710.2 (Purdon 1962)), *repealed by* Administrative Agency Law, Pub. L. 202, No. 53, § 5 (1978) (codified at 2 PA. CONST. STAT. ANN. § 101 (Purdon Supp. 1986)). Similarly, in the 1981 MSAPA, agency action replaced the rather convoluted concept of "contested case" from prior model acts and was intended to reduce litigation regarding the determination of when a person is entitled to a hearing. *See* 1981 HANDBOOK, *supra* note

court found the agency's denial of a hauling permit to be an adjudication which affected the appellant's right to transport vehicles, and held that agency action was subject to judicial review on appeal.⁶¹

Courts additionally have held that the requirements and protections of the MSAPA which pertain to contested cases do not apply to parole release proceedings when the statute specifically exempts a parole board from the definition of a "state agency."⁶² Furthermore, a state bar association has been deemed not to be a "state agency" because it was not authorized to adjudicate contested cases nor to "make rules affecting the rights and obligations of its members without [the] court's approval."⁶³ However, the MSAPA has been held to apply to a proceeding to deprive a business of its minority status even when the preamble to the statute, which created the minority status and its benefits, declared that the statute was not intended to give any minority business standing to sue.⁶⁴

B. *The Tendency to Adjudicate Individual Rights Without a Hearing*

When an administrative body is primarily concerned with finding facts and applying law to those facts to reach a decision concerning the rights of particular parties, it is engaged in a judicial function which requires a hearing. Since a hearing is required, the proceeding is a "contested case" subject to the requirements and protections of administrative procedure acts.⁶⁵

59, at 219; *see also* *Warwick Corp. v. Department of Transp.*, 61 Md. App. 239, 486 A.2d 224 (1985) (appellate court reversal of lower court decision that certification of state agency was not "contested case").

61. *See Newport Homes*, 17 Pa. Commw. at 322-23, 332 A.2d at 572-73.

62. *See, e.g., Beckworth v. New Jersey State Parole Bd.*, 62 N.J. 348, 357-58, 301 A.2d 727, 732-33 (1973) (holding that language of state Administrative Procedure Act, as well as legislative history, indicated that Act not intended to apply to parole proceedings).

63. *See, e.g., In re Rhode Island Bar Ass'n*, 118 R.I. 489, 491, 374 A.2d 802, 803 (1977) (holding that state bar association was not state agency).

64. *See, e.g., Warwick Corp. v. Department of Transp.*, 61 Md. App. 239, 246-47, 486 A.2d 224, 227 (1985) (holding that "no-standing" language of statute had "no bearing on the issue of certification or decertification of a minority business enterprise").

65. *See, e.g., Maryland-National Capital Park and Planning Comm'n v. Friendship Heights*, 57 Md. App. 69, 80, 468 A.2d 1353, 1358 (reversing trial court's interpretation of administrative procedure statute that agency hearing did not meet meaning of "contested case"), *cert. denied*, 300 Md. 89, 475 A.2d 1200 (1984); *accord Callahan v. Pennsylvania State Police*, 494 Pa. 461, 465, 431 A.2d 946, 948 (1981) (where there was no notice of hearing or opportunity to be heard, letter from state agency did not constitute valid adjudication).

The 1961 MSAPA confers jurisdiction on courts to review administrative agencies acting in their judicial and legislative capacities.⁶⁶ The Act requires state agencies to provide procedural safeguards for personal and property rights of individuals affected by agency action.⁶⁷ Accordingly, individual personal and property rights cannot be taken, denied, reduced, regulated, or otherwise modified by state agencies without affording due process to the persons affected. The process which is due depends on whether the agency is acting in its judicial capacity by adjudicating present individual rights in contested cases, or in its legislative capacity by duly promulgating rules, having the effect of law and the potential for general future application.⁶⁸

In contested cases involving individual personal or property rights, the agency must give individual parties notice of the time and place of the hearing and of the issues involved.⁶⁹ Compliance with statutory notice and hearing provisions has been held to be a prerequisite to valid agency action by an administrative tribunal.⁷⁰ Accordingly, non-compliance has been held to be a jurisdictional defect.⁷¹

Though state administrators are inclined to decide cases without a hearing or at an *ex parte* proceeding, the 1961 MSAPA requires administrators to give parties to a contested case an opportunity for a hearing.⁷² Thus, when a Pennsylvania agency rejected an application by a business for a permit to construct driveways from its place of business to a state highway, the denial of the application affected the property rights of the applicant and, thus, was deemed by the court to be an "adjudication."⁷³ As such, the business was entitled to a hearing. The Pennsylvania court found that where an agency adjudicates a contested case without affording a party an opportunity for a hearing, it is proper for the reviewing court to vacate the resulting action of the

66. See 1961 HANDBOOK, *supra* note 6, at 213-21.

67. See *id.* at 209-17.

68. See *Newport Homes*, 17 Pa. Commw. at 326-27, 332 A.2d at 574.

69. See 1961 HANDBOOK, *supra* note 6, at 215-17.

70. See, e.g., *Brazo v. Real Estate Comm'n*, 177 Conn. 515, 518, 418 A.2d 883, 887 (1979) (finding notice of suspension of broker's license given to real estate broker by real estate commission to be sufficient).

71. See *id.*

72. See 1961 HANDBOOK, *supra* note 6, at 214.

73. See *Hardee's Food Sys. v. Department of Transp.*, 495 Pa. 514, 519-20, 434 A.2d 1209, 1212 (1981) (finding commonwealth's exercise of police power in determining property rights to be adjudication for purpose of state administrative procedure act).

agency.⁷⁴ Similarly, the Delaware Superior Court held that where a state agency denied an individual unemployment benefits without allowing the individual to fully testify, the denial of benefits deprived the individual of a property interest without due process of law. As such, the Delaware court remanded the case back to the agency for a hearing.⁷⁵ At the hearing required by law, the parties must be given an opportunity: to present evidence, which is admissible if probative, to cross-examine witnesses and to make arguments.⁷⁶ No other matter may be considered in deciding the case.⁷⁷

The statutory basis for courts reversing agency decisions is section 15(g) of the 1961 MSAPA.⁷⁸ This section grants courts the authority to reverse agency decisions in certain circumstances. One such circumstance is when "the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . made upon unlawful procedure."⁷⁹ Thus, when an administrator makes a decision without affording the private party a hearing, that decision may be reversed by a reviewing court.

C. *The Tendency to Decide on the Basis of Matters Not Properly Before the Tribunal and to Confuse the Roles of Investigator, Prosecutor and Decision-Maker*

The reviewing court's statutory authority to reverse agency

74. *Id.*

75. See *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 240 (Del. Super. Ct. 1979) (case remanded to permit claimant full opportunity to testify before agency).

76. See 1961 HANDBOOK, *supra* note 6, at 214.

77. See *id.*

78. See 14 U.L.A., *supra* note 7, § 15(g) at 430-31. The pertinent portion of section 15(g) provides:

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. . . . The court may reverse or modify the decision [of the agency] if substantial rights of appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercises of discretion.

Id.

79. *Id.*

decisions also limits the administrator's propensity to decide cases on the basis of matters not properly before the tribunal, matters such as the administrator's own preformed opinions or prejudices. When the substantive rights of the petitioner might be prejudiced because the decision is unsupported by competent, material, and substantial evidence in view of the entire record as submitted, or is "affected by other error of law,"⁸⁰ the reviewing court can reverse the decision. Sections 9(e) and (f) of the Act provide that all matters to be considered by the administrator in reaching a decision must be offered into evidence and made a part of the record.⁸¹ If the administrator considers matters which are not part of the record, she will have made an error of law and her decision may be reversed by a court.⁸²

The case of *Lindy v. Welfare Commissioner*⁸³ illustrates an agency's propensity to decide contested cases on the basis of matters not properly before it. In *Lindy*, a "fair hearing officer" decided that Lindy was not medically eligible for state reimbursement for payments made by her for transportation to her physician's office.⁸⁴ In determining whether Lindy was eligible, the hearing officer considered medical evidence forwarded to him by the welfare agency after Lindy's hearing. On appeal, the Connecticut court found that the hearing officer had acted illegally in considering matters not introduced at the hearing, and therefore set aside the agency's decision.⁸⁵

To illustrate the length to which administrative agencies will go to consider matters not introduced into evidence, it is useful to examine two Maine cases involving the same physician against the private state medical association which was in consort with both the state licensing agency and the state welfare agency.⁸⁶

Dr. Gashgai, a physician licensed to practice medicine by the State Board of Registration in Medicine, was a member of the Maine Medical Association, a private association.⁸⁷ The Association's activities were guided by a set of by-laws, one of which pro-

80. *Id.* at 431.

81. *See id.* at 404.

82. *See id.* at 430-31.

83. 32 Conn. Supp. 606, 348 A.2d 314 (1975).

84. *Id.* at 607, 348 A.2d at 314.

85. *Id.* at 611, 348 A.2d at 316.

86. *See Gashgai v. Board of Registration in Medicine*, 390 A.2d 1080 (Me. 1978); *Gashgai v. Maine Medical Ass'n*, 350 A.2d 571 (Me. 1976).

87. *See id.* at 572. Membership in the private association was not a precondition to practicing medicine in the state of Maine. *Id.* at 573.

vided that the Association had “‘no power of authority’ to act upon any complaint . . . referred to it where the facts of the complaint are or may become the basis for an action in tort against the doctor whose conduct is being investigated until and unless any case which should arise” has reached final disposition.⁸⁸ Dr. Sullivan, acting as a claims consultant for the State Department of Health and Welfare, asked the Association to investigate Dr. Gashgai concerning payments made to him for medical services provided to recipients of public assistance.⁸⁹ The Association’s “investigation” consisted of a meeting with Dr. Gashgai during which members of the Association, using invoices and other documents supplied to them by the Department of Health and Welfare, cross-examined the doctor without giving him access to the documents.⁹⁰

As a result of the investigation, the Association issued a report concluding that Dr. Gashgai had submitted invoices to the Department of Health and Welfare which “showed gross overutilization, malpractice and unethical practice” and recommended that Dr. Gashgai be severely reprimanded.⁹¹ The Association sent the report to Dr. Gashgai, the Department of Health and Welfare, and the Board of Registration in Medicine for the State of Maine. On the basis of the report, the Department of Health and Welfare placed Dr. Gashgai on “a ‘constant surveillance’ list.”⁹² This classification required that all invoices submitted by him be “carefully reviewed to evaluate the propriety of his charges.”⁹³ Dr. Gashgai then filed suit seeking to permanently enjoin the Association from distributing the report, and to order the retrieval of copies already distributed. On appeal from the lower court’s grant of the injunction and order, the Maine Supreme Court affirmed, holding that Dr. Gashgai was entitled to the protections of the Association’s by-laws, which created a contract between it and its members.⁹⁴ The court stated that “[v]iolations of the by-laws in the Association’s dealings with Dr. Gashgai are thus breaches of contract specifically relating to Dr.

88. *Id.* at 575 n.2.

89. *Id.* at 573. The State Department of Health and Welfare was the state agency responsible for paying physicians for medical services provided to recipients of public assistance. *Id.*

90. *Id.*

91. *Id.* This recommendation was made solely on the basis of the informal investigation. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 575.

Gashgai which he is legally entitled to remedy by resort to the Courts.”⁹⁵

In the meantime, while Dr. Gashgai’s case against the Association was pending appeal, the Board of Registration in Medicine initiated a disciplinary proceeding against him. Again, Dr. Sullivan was involved, this time acting as Secretary to the Registration Board. Dr. Sullivan signed the complaint, sat with the Board during a hearing of Dr. Gashgai’s case, and had a copy of the Association’s report, the distribution’s of which Dr. Gashgai was seeking to enjoin. After this “hearing,” Dr. Gashgai was placed on probation for one year. On appeal, the Maine Supreme Court found that although “counsel for Dr. Gashgai expressly waived any objection to Dr. Sullivan’s sitting with the Board during the hearing . . . [nonetheless,] the combination of investigator, prosecutor and sitting member of the adjudicatory panel . . . create[d] an intolerably high risk of unfairness.”⁹⁶ The court held that the record contained numerous documents which were not entered into evidence, and thus, could not have been considered by the Board or the reviewing court.⁹⁷ Because the Board’s decision was not supported by matter admitted into evidence, the case was remanded with directions to reverse.⁹⁸ Thus, the state agency’s improper prosecution procedure allowed Dr. Gashgai to remain undisciplined even though the claims against him may have been meritorious.⁹⁹

D. *The Tendency to Make Rules Arbitrarily*

The administrator’s propensity to make rules arbitrarily has been curtailed by state courts which have strictly construed the requirements and definitions of state administrative procedure acts. The state acts clearly define those activities of executive

95. *Id.*

96. *Gashgai v. Board of Registration in Medicine*, 390 A.2d 1080, 1082 (Me. 1978).

97. *Id.* at 1084-86.

98. *Id.* at 1086.

99. *Id.* at 1085-86. The Maine high court wrote that it was “left completely in the dark as to how many ‘multiple diagnostic procedures’ the Board found that Dr. Gashgai had performed, and upon what basis the Board concluded that this amount was ‘extensive and unnecessary.’” *Id.* at 1085. The court noted that absent sufficient evidence, it could only theorize as to the Board’s findings, stating that such conjecture would not serve the legal system. *Id.* at 1086. The court wrote that “[n]either the administrative nor the judicial process would be enhanced were we to attempt to review the Board’s decision based upon our hypothesis of what the Board might have found from the evidence before it.” *Id.*

agencies which are rule-making or legislative,¹⁰⁰ and require agencies to comply with specific procedures as a precondition to the validity and enforceability of rules.¹⁰¹ The agency must circulate and publish notice of intended rule-making in order to give persons affected by the proposed rule the opportunity to submit data in the form of oral or written views to the agency. Adopted rules must be published, compiled, indexed and periodically revised.¹⁰²

It has been held that the underlying reason for the procedural requirements of administrative rule-making is the need for fairness and decisional soundness that should characterize ultimate agency determination.¹⁰³ State administrators have attempted to make rules arbitrarily, thus avoiding the procedural rule-making requirements, by using such ploys as labeling a rule a "final directive."¹⁰⁴ It has been held, however, that it is not the label placed by the agency on the activity which determines whether the agency must comply with the rule-making requirements of an administrative procedure act.¹⁰⁵ Rather, it is what

100. See 14 U.L.A., *supra* note 7, § 1 at 371-72 (serving as model for various state acts).

101. See *id.* § 2, at 384-85.

102. See *id.* § 5, at 377-98.

103. See, e.g., *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 329, 478 A.2d 742, 751 (1984) (noting that fairness is mandatory since agency determinations may have widespread application, going beyond effect on party before agency).

104. See, e.g., *Newport Homes*, 17 Pa. Commw. at 326-27, 332 A.2d at 574 (holding that Pennsylvania Department of Transportation's decision refusing application for permit could not be sustained by convenient classification as "final directive").

105. See, e.g., *Exxon Corp. v. Hunt*, 190 N.J. Super. 131, 133-34, 462 A.2d 193, 194-95 (N.J. Super. Ct. App. Div. 1983) (finding that although state agency had "become familiar" with position of party before it, agency had still not substantially complied with requirements of state administrative procedure act), *aff'd*, *Exxon Corp. v. Hunt*, 97 N.J. 526, 481 A.2d 271 (1984), *aff'd in part, rev'd in part*, 106 S. Ct. 1103 (1986). In *Hunt*, the New Jersey Department of Transportation published a proposed regulation governing expenditures under the New Jersey Spill Fund and Compensation Act. 190 N.J. Super. at 133, 462 A.2d at 194. Interested parties were invited to submit comments on or before a certain date. *Id.* Two days before that date, Exxon delivered written comments which were rejected as not being timely filed. *Id.* After the regulations were "adopted" by publication, Exxon sought a judgment declaring the regulations invalid for failure to comply with New Jersey's Administrative Procedure Act. *Id.* at 132, 462 A.2d at 194.

The state asserted that it was in substantial compliance with the Act and was already familiar with Exxon's position as stated in its comments. *Id.* at 133-34, 462 A.2d at 195. The court held that the state's failure to consider Exxon's comments was only a technical error which did not justify the invalidation of the regulations. *Id.* at 134, 462 A.2d at 195. Nevertheless, the court declared the regulation to be invalid because its promulgation denied Exxon due process of

the agency does that determines whether it must comply with the required public notice and hearing provisions.¹⁰⁶ In order for rules to have legal effect and to form the basis of an agency's decision in a contested case, strict compliance with the mandated rule-making procedures of the state acts is necessary.

VI. CONCLUSION

The framers of the United States Constitution understood that accumulation of all powers in the same hands is a danger to individual liberty. The writers of the first Model State Administrative Procedure Act realized that some executive agencies of federal and state governments possessed almost uncontrolled judicial and legislative authority which jeopardized personal freedom.

Intending to restrain administrative absolutism, the American Bar Association's Special Committee on Administrative Law drafted the 1955 Model Act after eleven years of studying the history and mechanism of administrative law. In 1961, the Commission on Uniform State Laws and the American Bar Association proposed a revised MSAPA,¹⁰⁷ which has been adopted by 29 states and the District of Columbia. This Act more clearly and specifically defines the process available to individuals whose personal and property rights might be impaired by discretionary actions of state agencies.

The controversies examined in this Article indicate that administrators' tendency to avoid the process of an adversary proceeding persist. But, where state legislatures have adopted the MSAPA or its equivalent, judicial review of agency actions has served as a check on this seemingly inherent and universal tendency. As the focus of power shifts among the executive, legislative and judicial branches of state governments, the Model Act must reflect such developments.

In 1981, the Commissioners adopted a new Model Act in response to certain changes in state governments.¹⁰⁸ First, the 1981 Act recognizes that state governments and administrative

law. *Id.* Where specific requirements of notice and written comments are not followed, the court held, there could not be substantial compliance with the Act. *Id.*

106. *See id.* at 134, 462 A.2d at 195.

107. For the text of the revised MSAPA, see 1961 HANDBOOK, *supra* note 6, at 206.

108. For the text of the 1981 Model Act, see 1981 HANDBOOK, *supra* note 59, at 219.

agencies have experienced a tremendous growth in power and responsibility since the adoption of the 1961 Act.¹⁰⁹ State agencies administer environmental, public welfare benefits and other programs not conceived of by the drafters of the 1944 and 1961 Acts. Because state executive agencies are authorized to give and take statutorily created property rights, the new Model Act provides for an expanded due process scheme. Second, as state legislatures have adopted the 1961 Act, the Act has been altered substantially and the 1981 Act reflects these changes. Third, the 1981 Act ensues from state courts upholding legislative delegation of broad authority to state executive agencies, provided those delegations are restrained by adequate procedural safeguards.¹¹⁰ Like the 1944 and 1961 Acts, the 1981 Act creates only procedural rights and duties. A more extensive and detailed obligation is imposed upon state agencies to provide process to private parties who may be affected by agency actions.¹¹¹ Additionally, the new Model Act requires state agencies to provide public access to all law and policy relied upon by agencies in their legislative and judicial capacities.¹¹² The 1981 Act also encourages public participation in the agency rule-making process.¹¹³

In view of these significant changes from previous administrative procedure acts, states are respectfully urged to adopt the 1981 version of the Model State Administrative Procedure Act.

109. *Id.* at 215-18.

110. *Id.* at 217 (citing 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, 3:15, at 209-14 (2d ed. 1978)).

111. For a discussion of the purpose of the 1981 Model Act, see 1981 HANDBOOK, *supra* note 59, at 218.

112. *Id.*

113. *Id.*